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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of:

Petition to Amend Rule 1.6 of the
Arizona Rules of Criminal Procedure

Supreme Court No. R-06-0016

**Comment of the Maricopa County
Public Defender**

The Maricopa County Public Defender's Office ("MCPD") opposes the modified petition to amend Rule 1.6 that is pending before the Court. The petition was recommended by a majority of the Criminal Rules Advisory Committee (CRVAC), but opposed by a minority of the members. The minority's report, attached as Appendix 7 to the CRVAC's June 17, 2009 Report to the Arizona Judicial Counsel, provides a detailed discussion of legal and practical concerns with the pending petition and provides a cogent alternative rule that addresses these concerns.

The majority and minority proposals have the same basic structure. Each provides a three-tiered approach: (1) proceedings that can be handled by videoconferencing without a defendant's consent; (2) proceedings that can occur by videoconferencing if the defendant consents; and (3) proceedings that, absent compelling circumstances, should always be done in person even if the parties and the court would prefer to use videoconferencing.

The key difference between the majority and minority positions is that the majority takes the view that initial appearances are proceedings that may be handled by videoconference without the defendant's consent, while the minority believes that defendants should retain the right to appear in person for initial appearances and that videoconferencing of these proceedings should only occur if the defendant voluntarily agrees to waive his right to be personally present.

The majority's approach appears to be premised on the erroneous belief that initial appearances are limited to housekeeping matters. As stated by the majority at page 26 of their report, their proposed rule allows the court to hold initial appearances by videoconferencing without a defendant's consent because initial appearances are "one of six 'housekeeping matters', as specified in paragraph (d)..." As discussed in detail in the minority report and the comment submitted by the Pima County Public Defender, initial appearances are critical events,

addressing key issues such as probable cause, release conditions, immigration status, and medical and mental health needs.

With regard to release conditions, the majority, in effect, concedes that a defendant has a right to be personally present: their proposed rule provides a defendant with an absolute right to be present for any hearings on motions for release that are filed after the initial appearance, apparently based on the recognition that such hearings cannot be shrugged off as mere housekeeping matters. This same recognition should be afforded to the first determination of release conditions made in a case, which is often far more critical than subsequent hearings. It is at this first hearing, within hours after an accused is arrested, that the requirement of “presentment” is most acutely needed (see discussion at pages 6 and 7 of Minority Report) and mandated by A.R.S. § 13-3898’s directive that the accused be “taken before the nearest or most accessible magistrate in the county in which the arrest occurs...”

This need for personal presence is of heightened importance in Maricopa County, which, like a number of other jurisdictions across the state, does not provide adequate funding to enable defense counsel to appear at initial appearances. Consequently, the defendant himself needs to be in the courtroom to

advocate on his own behalf and to provide essential information pertaining to his release.

The minority's proposed rule addresses this problem by including initial appearances among those proceedings which may be conducted by videoconference only with the defendant's consent. Like the majority's proposal, the minority's proposed rule provides a means to enable defendants to choose to appear at the overwhelming majority of proceedings by videoconferencing, while still allowing the court to unilaterally order videoconferencing for those matters that are truly "housekeeping" matters where the defendant's lack of personal presence will not impact the "fullness of his opportunity to defend against the charge." *State v. Schackart*, 190 Ariz. 238, 255 (1977).

Finally, with regard to potential costs, we anticipate that the minority proposal has the potential to effectuate greater savings than the majority's proposal. Jail days are, without question, among the highest expenses for the criminal justice system. As discussed in the Pima County Public Defender's comment, substantial cost-savings are realized by informed release decisions being made at initial appearances. The presence of the accused in the courtroom at initial appearance clearly enhances the accuracy of these determinations and impresses upon the

defendant the importance of the proceeding and the need to comply with all court orders. In addition, as stated at page 3 of the minority report:

[T]he projected cost savings analysis submitted by the majority is flawed and far too speculative to be of any use. It fails to factor in the capital expenditures needed to create videoconferencing that meets minimum standards, it neglects to address the shifting of costs to defense counsel needing to appear at the jails, and it is premised on a far broader rule than the one currently being proposed by the majority. Furthermore, it does not account for the fact that the Pima County Superior Court is already fully equipped to handle initial appearances in person in its existing jail court. The Majority never made any meaningful inquiries into what costs would be saved if initial appearances were required to be videoconferenced at the jail as opposed to using the facilities for in-person appearances that already exist. Indeed, such a study would have likely shown the savings to be nonexistent for the overwhelming majority of Arizona cases. Both Maricopa and Pima County presently conduct initial appearances in courtrooms that have been built in their jails. It is unknown how many other counties conduct initial appearances in this manner. In any event, there is no information available to this Committee as to what savings could possibly be achieved by moving a judge to the courthouse and requiring defendants to appear by video. The real losses attendant to such a change, however are abundantly apparent: the lack of a face-to-face meeting with a judicial officer at initial appearances will violate the law and undercut the accuracy and effectiveness of critical determinations concerning release, medical needs and mental health assessments.

Accordingly, we urge the Court to approve the minority's proposed amendments to Rule 1.6, Arizona Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this 17th day of July, 2009



James J. Haas
Maricopa County Public Defender